BUSRI SEBLI

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
LINTON ALBERT J
[CRIMINAL APPEAL NO: 42-34-2007-I]
18 MAY 2009

CRIMINAL LAW: *Anti-Corruption Act 1997 - Section 11 - Soliciting and accepting RM100 as inducement to refrain from taking action against traffic offence - Prima facie case - Whether established - Whether prosecution proved case beyond reasonable doubt - Invocation of statutory presumption under s. 42(1) Anti-Corruption Act 1997 - Whether misapplied - Whether there was serious miscarriage of justice which rendered conviction unsustainable*

The facts relied on by the prosecution to establish its case against the appellant who was charged with and convicted of the offence of corruption under s. 11 Anti-Corruption Act 1997 were essentially from the testimony of the complainant, one Roslan Adenan (PW2) and his friend and housemate Mohammad Iskandar Rosseri (PW3). It was the finding of the Sessions Court judge that at the end of the case for the prosecution there was 'inherently credible evidence' to establish a *prima facie* case. The two essential ingredients of the offence relevant to this appeal were these, namely (i) that the appellant solicited and accepted RM100 from PW2; and (ii) that the RM100 was an inducement to the appellant to refrain from taking action against PW2 for the traffic offence of driving a motor scooter without a front plate number. The sworn testimony of the appellant was that he had never asked for the bribe; that Lance Corporal Mohamad Ridhuan was in charge of their patrol unit; that when PW2 and PW3 were stopped he did not alight from the patrol car or question them and that it was Lance Corporal Mohamad Ridhuan who released PW2 and PW3 at the police station because the appellant did not have the power to do so. In considering all the evidence at the end of the case, the Sessions Court Judge questioned the failure of the appellant to call Lance Corporal Mohamad Ridhuan who was offered to him, as a witness 'to corroborate' his testimony. It was concluded that the appellant failed to rebut the statutory presumption under s. 42(1) of the Anti-Corruption Act 1997 and had failed to raise any reasonable doubt on the prosecution's case and was accordingly convicted of the amended charge.

Held (allowing the appeal; quashing conviction and setting aside sentence; discharging and acquitting appellant):

(1) There were serious errors on the burden and standard of proof which made the conviction manifestly unsafe. Firstly, the burden was on the prosecution to prove its case beyond reasonable doubt, Here, no such finding was made by the Sessions Court judge. Secondly, there was no rule of law that required the appellant to call any particular witness to corroborate his testimony. It was not only wrong in law but a grossly unfair requirement unknown in our criminal justice system to question the appellant's failure to call Lance Corporal Mohamad Ridhuan even though he was offered as a witness by the prosecution. Thirdly, the invocation of the statutory presumption under s. 42(1) of the Anti-Corruption Act 1997 was misapplied because the defence put forth by the appellant was based on the need for the prosecution to prove that the appellant solicited and accepted RM100 from PW2. The findings that the appellant failed to rebut the statutory presumption and the adverse inference attached to the appellant for his failure to call Lance Corporal Mohamad Ridhuan were therefore manifestly perverse. In the circumstances, there was a serious miscarriage of justice which rendered the conviction unsustainable. (paras 10, 11, 12, 14 & 15)

Case(s) referred to:
Attan Abdul Gani v. PP [1969] 1 LNS 12 HC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 11, 42(1)

For the appellant - Lim Lian Kee; M/s LL Lee & Co Advocates
For the respondent - Mohamad Asmawi DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Linton Albert J:

[1] The facts relied on by the prosecution to establish its case against the appellant who was charged with and convicted of the offence of corruption under s. 11(a) Anti-Corruption Act 1997 were

essentially from the testimony of the complainant, Roslan bin Adenan (PW2) and his friend and housemate Mohammad Iskandar Bin Rosseri (PW3). A

[2] PW2 and PW3 were on their way home on PW2's motor scooter when they were stopped by a police patrol car at a traffic light near the Waterfront. Inside the patrol car were the appellant who was the driver and his two other colleagues Lance Corporal Dayang Huzaimah bte Abang Mohd Basri (PW4) and Lance Corporal Mohamad Ridhuan who was not called as a witness either by the prosecution or the defence. The three came out of the patrol car and variously asked questions. PW2 said the appellant asked him about the handle cover and number plate of the motor scooter. PW2 and PW3 were asked by the appellant to go to the Police Station where PW2 was taken by the appellant to the back where the appellant discussed with PW2 about PW2 not issuing a summon for a traffic offence which would result in the motor scooter being detained and in return PW2 would have to give the appellant some money. There was some haggling as to the amount, which took place in front of PW3 but finally it was agreed at RM100 which PW3 gave to the appellant out of his wallet because PW2 did not have any money. After that PW2 went home and took down the name and police number of the appellant. B C D E

[3] In evaluating the evidence adduced by the prosecution, the learned Sessions Court judge admitted that it was 'puzzling' why PW2 did not name the appellant in the First Information Report to the Anti-Corruption Agency. She also alluded to the inconsistency of the evidence of PW2 and PW8, Azmizan bin Abdullah, the Anti-Corruption Agency officer who took the First Information Report. PW2 said he told PW8 the name of the appellant whereas PW8 testified that PW2 did not because PW2 could not remember the name when PW8 asked him. The learned Sessions Court judge also found that there was no satisfactory explanation on the traffic offence committed by PW2 as reported by him in the First Information Report which was for 'modification' of the motor scooter whereas in his testimony PW2 said that he was stopped because of the broken handle cover and absence of the front plate number. The conclusion of the learned Sessions Court judge on this aspect of the prosecution's case is, for the sake of completeness reproduced *verbatim*: F G H I

> ... this unexplained anomaly may have dented somewhat, and caused a chink in the overall strength of prosecution's case but not in my view serious enough to reduce it to shambles.

[4] It was also the finding of the learned Sessions Court judge that PW3 could not be considered an accomplice because PW3 was only lending money to PW2 and was "not privy to the exchange between the accused and Roslan when the bribe was demanded" although it would offend common sense to suggest that in the circumstances the RM100 was given by PW3 to the appellant, PW3 did not know that it was for the bribe demanded by the appellant. On the failure of the prosecution to call Lance Corporal Mohamad Ridhuan the learned Sessions Court judge had this to say:

> To be honest, I was also taken aback when L/Corp Ridhuan was not called especially after the impeachment proceeding against L/Corp. Dyg Huzaimah but bearing in mind that under section 135 of the Evidence Act 1950 no number of witnesses is required to prove a fact and the general rule which is that evidence must be weighed and not counted, I would give the prosecution the benefit of the wisdom in not calling him.

[5] It is one thing to find that adverse inference should not be invoked against the prosecution for failure to call lance Corporal Mohamad Ridhuan but it is another thing and certainly prejudicial to the appellant to give the prosecution the 'benefit of the wisdom in not calling him'. Having resolved all these issues in favour of the prosecution the learned Sessions Court judge found that at the end of the case for the prosecution there was 'inherently credible evidence' to establish a *prima facie* case.

[6] The two essential ingredients of the offence relevant to this appeal are these, namely:

1. that the appellant solicited and accepted RM100 from PW2; and
2. that the RM100 was an inducement to the appellant to refrain from taking action against PW2 for the traffic offence of driving a motor scooter without a front plate number.

[7] The sworn testimony of the appellant was that he had never asked for the bribe; that Lance Corporal Mohamad Ridhuan was in charge of their patrol unit; that when PW2 and PW3 were stopped he did not alight from the patrol car or question them. It was Lance Corporal Mohamad Ridhuan who released PW2 and PW3 at the Police Station because the appellant did not have the power to do so.

[8] In considering all the evidence at the end of the case, the learned Sessions Court judge questioned the failure of the appellant to call Lance Corporal Mohamad Ridhuan who was offered to him, as a witness, 'to corroborate' his testimony. The learned Sessions Court judge also found that the appellant had a statutory presumption to rebut which is set out in s. 42(1) of the Anti-Corruption Act 1997 thus:

> Where in any proceedings against any person for an offence under section 10, 11, 13, 14 or 15 it is proved that any gratification has been accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

[9] The learned Sessions Court judge concluded that because the statutory presumption applied to the appellant which placed the onus on the appellant, an adverse inference could be drawn against the appellant. At the end of it all, it was concluded that the appellant failed to rebut the statutory presumption under s. 42(1) of the Anti-Corruption Act 1997 and has failed to raise any reasonable doubt on the prosecution's case and was accordingly convicted of the amended charge.

[10] It is clear from what I have set out above that there are serious errors on the burden and standard of proof which make the conviction manifestly unsafe. Firstly, the burden is on the prosecution to prove its case beyond reasonable doubt. Here, no such finding was made by the learned Sessions Court judge. In *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1, Edgar Joseph Jr FCJ delivering the judgment of the Federal Court, said:

> ... the most basic limitation upon prosecutorial discretion in the presentation of a case, is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, ...

[11] Secondly, there is no rule of law that requires an appellant to call any particular witness to corroborate his testimony. It was not only wrong in law but a grossly unfair requirement unknown in our criminal justice system to question the appellant's failure to call Lance Corporal Mohamad Ridhuan even though he was offered as a witness by the Prosecution.

[12] Thirdly, the invocation of the statutory presumption under s. 42(1) of the Anti-Corruption act 1997 was misapplied because the defence put forth by the appellant was based on the need for the prosecution to prove that the appellant solicited and accepted RM100 from PW2. In *Attan Abdul Gani v. PP* [1969] 1 LNS 12; Sharma J said:

> .. the presumption comes into operation only when the factum of payment is proved as it was to the satisfaction of the learned president in this case. If payment is not proved the presumption does not arise and consequently there is nothing which the accused is required to prove to the contrary.

[13] The findings that the appellant failed to rebut the statutory presumption and the adverse inference attached to the appellant for his failure to call Lance Corporal Mohamad Ridhuan were therefore manifestly perverse.

[14] I do not think it is necessary to subject each of the other infirmities I have set out to judicial scrutiny except perhaps to state that taken in isolation they may not be sufficient but taken together they may well constitute a basis for saying that the prosecution has failed to prove its case beyond all reasonable doubt.

[15] In the circumstances there was a serious miscarriage of justice which renders the conviction unsustainable. The appeal is accordingly allowed. The conviction is quashed and sentence set aside. The appellant is discharged and acquitted. The fine if paid be refunded to the appellant.